No. 78-547

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANDREW F. BURTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner argues that he was denied the right to assistance of counsel of his choice because the district court refused to grant him a continuance on the first day of trial to replace one of his two attorneys.

Following a jury trial in the United States District Court for the District of Columbia, petitioner, a physician, was convicted on 28 counts of distributing a controlled substance, in violation of 21 U.S.C. 841. He was sentenced to concurrent terms of five years' imprisonment on each count, to be followed by a special parole term of two years, and was fined $15,000. The court ordered all except six months of the sentence suspended and placed petitioner on probation for five years.[1] The court of appeals affirmed (Pet. App. 1-29) in a thorough opinion upon which we rely.

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[1]The court also revoked petitioner's medical license pursuant to 2 D.C. Code 131.

On April 23, 1976, Dovey Roundtree, one of two attorneys retained by petitioner, filed a motion for leave to withdraw as co-counsel. On April 26, 1976, the scheduled trial date, the district court granted her motion.[2] Petitioner then requested a continuance of 30 to 60 days to retain a replacement to assist his other attorney, Allen Hutter, at trial (Tr. 8-9). Petitioner, who is black, conceded that he was competently represented by Hutter, but he stated that he wanted a black lawyer to serve as co-counsel (Tr. 11-13). The government objected to the continuance on the grounds that it would further inconvenience the government, which had spent five weeks arranging for the presence of its witnesses, and that the case had already experienced several substantial delays since indictment (Tr. 9-10). The court noted that Hutter was an experienced trial attorney who had been a member of the bar for 15 years (Tr. 11), that Hutter had served as counsel for more than two years in this case (Tr. 11-13), and that petitioner wanted another attorney simply "because [that] additional attorney would happen to be black" (Tr. 13). It therefore denied the motion for a continuance.

The district court's denial of a continuance was well within its discretion and did not violate the Sixth Amendment. As the court of appeals observed, "[t]he right to retain counsel of one's own choice is not absolute" (Pet. App. 4). It "must be carefully balanced against the public's interest in the orderly administration of justice" (Pet. App. 5) especially where, as here, petitioner's request would have meant a last-minute delay in a complex trial that lasted nearly two weeks. Petitioner did not contend in the court of appeals, nor does he contend now, that

[2]Roundtree explained that she refused to involve herself in a narcotics case unless the defendant was a drug user or addict (see Tr. 3). She told the court that she and petitioner's other attorney, Allen Hutter, were "working at cross purposes" (Tr. 4) and that she had explained her views of the case to petitioner (Tr. 5).

Hutter's representation was deficient in any way. See Pet. 6. In these circumstances, the trial judge properly weighed petitioner's desire for an additional attorney against the burden to the court, the government, and the witnesses, and properly decided that it would not be unfair to require petitioner to proceed with his retained counsel. See *Gandy* v. *Alabama*, 569 F. 2d 1318, 1324 (5th Cir. 1978); *United States* v. *Lespier*, 558 F. 2d 624, 628-629 (1st Cir. 1977); *United States* v. *Warren*, 453 F. 2d 738, 745 (2d Cir. 1972); *Giacalone* v. *Lucas*, 445 F. 2d 1238, 1240-1241 (6th Cir. 1971); *Asbury* v. *Oliver*, 318 F. Supp. 44, 45-46 (W.D. Va. 1970).[3]

Petitioner argues (Pet. 10-12) that the continuance should have been granted because Roundtree's withdrawal was for reasons beyond his control. But that does not relieve the district court from deciding whether a continuance is warranted. If the trial had not been about to begin, the district court might have decided to grant the continuance (see Pet. App. 21). Nor is there any suggestion either in the district court's action or in the court of appeals' opinion that restricts petitioner's right to hire as many attorneys as he wished (see Pet. 8-9). The question was whether the district court was bound to postpone the trial while he did so. It thus cannot be said either that petitioner was denied his Sixth Amendment right to "a reasonable opportunity to employ and consult with counsel" (*Chandler* v. *Fretag*, 348 U.S. 3, 10 (1954)) or that the denial of the continuance was "so arbitrary as to violate due process." *Ungar* v. *Sarafite*, 376 U.S. 575, 589-590 (1964).

[3]In neither *United States* v. *Mardian*, 546 F. 2d 973, 979 (D.C. Cir. 1976) nor *Lee* v. *United States*, 235 F. 2d 219, 220 (D.C. Cir. 1956), upon which petitioner relies (Pet. 13, 14), did the defendant have retained co-counsel who was then ready to proceed to trial. Moreover, as the court below noted (Pet. App. 28 n.49), the most significant factor in *Mardian* was that the government did not oppose a continuance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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